Supreme Court, U.S.
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In The
Supreme Court of the United States

MARTINGALE, LLC,

Petitioner,

v.

THE CITY OF LOUISVILLE; WATERFRONT DEVELOPMENT CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Anti-Injunction Act, 28 U.S.C. § 2283, preclude a federal court from granting a declaratory judgment on federal question issues in a first-filed action, when a state action implicating those issues is subsequently filed?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The petitioner has no parent companies or any non-wholly owned subsidiaries.

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CITATIONS TO OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals in this case is dated March 17, 2004 and is reported at 361 F.3d 297. This opinion is also reprinted in the appendix to this Petition beginning at App. 1.

The decision of the Sixth Circuit Court of Appeals denying rehearing is dated April 14, 2004 and appears reprinted in the appendix to this Petition beginning at App. 27.

The opinion of the United States District Court for the Western District of Kentucky is dated June 5, 2002 and is not reported. This opinion appears reprinted in the appendix to this Petition beginning at App. 14.

JURISDICTION

On April 14, 2004, the Sixth Circuit Court of Appeals denied a petition for rehearing after dismissing the Petitioner's case pursuant to 28 U.S.C. § 2283. Jurisdiction was proper in the Sixth Circuit pursuant to 28 U.S.C. § 1291 in that the appeal was from a final decision of the District Court granting Respondents' Motion for Summary Judgment. Jurisdiction in the District Court was proper pursuant to 28 U.S.C. § 1331 as this is an action arising under the Constitution and laws of the United States. This Court's jurisdiction is proper pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Anti-Injunction Act, 28 U.S.C. § 2283, which provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

This case also involves, in part, the Declaratory Judgment Act, 28 U.S.C. § 2201(a), which provides in part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

I. Procedural history of the case

This action was initially filed by the Petitioner in the United States District Court for the Western District of Kentucky in April 2001 challenging, primarily on federal law bases, the right of the city of Louisville to condemn a bridge located in interstate commerce across the Ohio River at Louisville, Kentucky, along with any attendant state and federal franchises to maintain and use the bridge. *Martingale LLC v. City of Louisville*, 361 F.3d 297, 300 (6th Cir. 2004). App. at 4. Litigation proceeded apace

in the United States District Court with the Petitioner filing a Complaint, and an Amended Complaint, and the Defendants filing an Answer and Amended Answer. Defendants filed a Motion for Summary Judgment, on July 28, 2001, the same day they filed a state court proceeding seeking to condemn Petitioner's rights in the bridge. App. at 4.

In the Federal Court litigation, issues were raised about the right of the city of Louisville to condemn a federally granted bridge charter; the right of Louisville to take action which interfered with interstate commerce on a bridge over a navigable river; and the impact of an Interstate Commerce Commission order of abandonment of the railway tracks on the bridge in question. App. at 5. The District Court issued its final decision on June 8, 2002 granting a summary judgment dismissing the federal action on the merits. App. at 25. Over six months later on December 11, 2002, the Kentucky Circuit Court[1] decided that the city of Louisville had the right to condemn the bridge. That decision is now on appeal before the Kentucky Court of Appeals. No trial has yet been set on the issue of the value of the bridge.

In the federal appeal, the Sixth Circuit affirmed the dismissal of this action but *not* on the merits as determined by the District Court. Rather, the Sixth Circuit relied instead upon 28 U.S.C. § 2283, the Anti-Injunction Act, holding that the statute removed the power of the District Court to decide the case. The Court held it was of no moment that the federal action was filed first because

[1] The Circuit Court is Kentucky's general trial jurisdiction court.

the state court condemnation action was filed *before* the federal decision was rendered. App. at 12. Because the action did not fall within one of the three exceptions explicitly contained within the statute, the District Court did not have the power to decide action. App. at 8-10. The Sixth Circuit held that, even though Martingale had sought only a declaratory judgment, seeking such relief was tantamount to seeking an injunction which is forbidden by the Anti-Injunction Act. Martingale's petition for rehearing was denied without opinion. App. at 27.

II. Factual Background

In 1872, Congress authorized the Secretary of War to permit the construction of bridges across the Ohio River for various uses including railroad transportation. App. at 15. Using this authority, the Secretary of War specifically approved of the bridge in question. *Id.* The Kentucky General Assembly also granted a perpetual franchise to the Louisville and Jeffersonville (Indiana) Bridge Company in 1888 to "construct, maintain and operate a bridge for the passage of cars, vehicles ... pedestrians and livestock over and across the Ohio River and to charge a toll for the bridge's use". App. at 15-16. In February 1889, the plans of the Bridge Company for the construction of the bridge were approved; construction of the bridge was completed in 1896. App. at 16.

In late 1968, the then owner of the bridge, along with the Penn Central Company, filed an application with the ICC to abandon the use of the bridge for railway purposes. App. at 16. On October 16, 1987, Bridge the Gap purchased the bridge at a sheriff's sale. App. at 17. Thereafter, the Kentucky Court of Appeals determined that the

bridge itself constituted personal property severed from the underlying real property.

Bridge the Gap, the owner of the bridge as a result of the sheriff's sale, attempted to negotiate the sale of the bridge to the City of Louisville's Waterfront Development Corporation which desired to acquire the bridge for use as a pedestrian walkway across the Ohio River. App. at 18. This use was one of the purposes envisioned by the franchises granted in the nineteenth century. Negotiations proved unsuccessful, however, and Bridge the Gap sold its interests in the bridge to Martingale. Martingale envisioned connecting the bridge to a residential condominium to be constructed on the Indiana side of the Ohio River and renovation and use of the bridge in exactly the same fashion envisioned by the Waterfront Development Corporation – as a pedestrian bridge linking Jeffersonville, Indiana and Louisville, Kentucky. In late 2000 and early 2001, negotiations continued with the Waterfront Development Corporation about a potential voluntary acquisition of the bridge. When these negotiations broke down, in April of 2001, this action was filed.

REASONS FOR GRANTING THE WRIT

I. Certiorari is warranted under the applicable standards.

The most common reason for granting a writ of certiorari is the existence of a conflict between the circuits. Rule 17.1 of the Rules of this Court, states that decisions of federal courts of appeal "that conflict with decisions of other sister courts on the same matter constitute one category of cases on which certiorari may be granted."

Justice Stevens recognized this as one of the reasons justifying a grant of certiorari in *Bunting v. Mellen*, 124 S.Ct. 1750, 1754 (2004) ("the second reason justifying a denial of certiorari is the absence of a direct conflict among the Circuits."). Moreover,

> [t]he Supreme Court *usually, but not necessarily*, will grant certiorari where the decision of the federal court of appeals, as to which review is sought, is in direct conflict with the decision of another court of appeals on the same matter . . . One of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal court of appeals. (emphasis in original)

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, *Supreme Court Practice* § 4.4, 197 (6th ed., Bureau of National Affairs Inc. 1986)

Here, a direct and irreconcilable conflict exists on the issue in question between the United States Court of Appeals for the Sixth Circuit, on the one hand, and the Courts of Appeals for the First, Third, Fifth, Seventh and Eighth Circuits, on the other. In addition, two other Circuits – the Second and Fourth have sided to some extent with the Sixth. Thus, this case starkly presents an issue falling four square within the principles justifying a grant of certiorari.

II. Sixth Circuit decisions are at odds with those of five other circuits regarding the applicability of the Anti-Injunction Act to federal question, declaratory judgment actions which are first-filed in federal court.

In *Martingale*, the Sixth Circuit held that because the District Court action did not fit into one of the three exceptions "imbedded within the statute's text" the action must fail. App. at 8-10. With respect to Martingale's argument that because it only sought declaratory relief, the Anti-Injunction Act was inapplicable, the Court found the argument to be "clever, but unpersuasive." App. at 10. Most importantly, with respect to the timing of filing of the state and federal court actions, the Sixth Circuit held: "the fact that the City did not file the state court lawsuit until after Bridge the Gap and Martingale filed suit in federal district court has no bearing on the applicability of the Anti-Injunction Act." App. at 12. The Court found support for this proposition in its own case of *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 532 (6th Cir. 1978).

This iron-clad, order-of-filing-is-of-no-moment rule holds that as long as the state action is filed before the federal court renders a judgment, the federal court is divested of the authority to act. This rule diverges significantly from the rules established in other circuits in applying the Anti-Injunction Act.

The Seventh Circuit maintains perhaps the clearest conflict with the Sixth Circuit: "[w]e therefore hold that the mandatory prohibition in § 2283 against injunctions staying court proceedings does not apply to state actions commenced after a motion for injunctive relief is filed in the federal court." *Barancik v. Investors Funding Corp. of New York*, 489 F.2d 933, 938 (7th Cir. 1973).

Wright and Miller, have recognized the existence of this conflict between the Sixth and Seventh Circuits: "[t]he Supreme Court granted certiorari to resolve this conflict, but the writ was dismissed when the parties settled their dispute." Charles Alan Wright, Arthur R. Miller, *Federal Practice and Procedure* vol. 17, § 4222, 507-508 (2d ed., West 2004). Also, according to Wright and Miller, later decisions have left the answer still in doubt. *Id.* at n.23.

In *Royal Insurance Company of America v. Quinn-L Capital Corporation*, 3 F.3d 877, 884 (5th Cir. 1993), the Fifth Circuit also recognized the conflict, stating that,

> [a] circuit split exists on the question of whether the [Anti-Injunction] Act has any application where the injunction is sought before a state suit has been filed but is not issued until after the state suit was filed.... Three circuits have adopted the rule that the Act does not apply where the federal suit is filed first.... Two circuits, on the other hand, have held that the Act should be applied to the case as it stands, regardless of the order in which the actions were filed.

Since the decision in *Royal*, one other circuit – the Eighth Circuit – has recognized the conflict and sided with the Fifth Circuit. *Prudential Ins. Co. of America v. Doe*, 140 F.3d 785, 788 (8th Cir. 1998).

Not only is the Sixth Circuit at odds with five other circuits, the other circuits incrementally differ from each other. This divergence of opinion among the circuits concerning the application of the Anti-Injunction Act to first-filed declaratory judgment actions also demonstrates why certiorari should be granted. The positions of the various circuits are summarized below:

First Circuit: Pure First-to-File

The First Circuit has adopted the first-to-file rule, meaning that if the federal action is filed first a subsequent state court action will not trigger the Anti-Injunction Act. *Hyde Part Partners v. Connolly*, 839 F.2d 837, 842 n.6 (1st Cir. 1988); *Philip Morris Inc. v. Harshbarger*, 946 F. Supp. 1067, 1074 (D. Mass. 1996).

Second Circuit: Sixth Circuit, Timing Irrelevant

In *Standard Microsystems Corporation v. Texas Instrument Inc.*, 916 F.2d 58, 61-62 (2nd Cir. 1990), the Second Circuit, in the context of an injunction, considered and applied the Sixth Circuit's reasoning rejecting, as a result, much of the reasoning of the Seventh Circuit.

Third Circuit: First-to-File, if Federal Question

While the Third Circuit acknowledged that in the typical situation a declaratory judgment will be treated as an injunction for the purposes of the Anti-Injunction Act, it has also held:

> But if the state suit is likely to turn on a question of federal law with which a federal court is likely to be more familiar and experienced than the state court, and if the state court does not proceed in normal course to adjudicate the matter or otherwise manifests willingness to hold its hand pending federal decision, on that question we think it is neither necessary nor desirable to construe section 2283 as precluding the federal court from issuing a declaratory judgment on the common federal question.

Thiokol Chemical Corp. v. Burlington Indus. Inc., 448 F.2d 1328, 1332 (3rd Cir. 1971). This ruling looks to the character and purpose of the suit in addition to the policy underlying the Anti-Injunction Act before making a determination of the applicability of the Act to a federal court in a first-filed action. See, *Garrett v. Hoffman*, 441 F. Supp. 1151, 1156 (E.D. Pa. 1977).

Fourth Circuit: Sixth Circuit, Timing Irrelevant

Denny's, Inc. v. Cake, 364 F.3d 521, 529-532 (4th Cir. 2004) recognized the existence of a conflict between the Circuits and adopted the Sixth Circuit's timing is irrelevant rule.

Fifth Circuit: Comity

In *Texas Employers Ins. Assoc. v. Jackson*, 862 F.2d 491, 506 (5th Cir. 1988), the Court invoked a sort of comity analysis in deciding that a declaratory judgment action could properly proceed in the face of a § 2283 challenge. A later Fifth Circuit case recognized and expanded upon this decision. *Travelers Ins. Co. v. Louisiana Farm Bureau Fedn., Inc.*, 996 F.2d 774, 776 (5th Cir. 1993). The Fifth Circuit in *Royal Ins. Co. of America*, 3 F.3d at 886, applied the same analysis in determining that "[w]here the federal case is filed substantially prior to the state case, and significant proceedings have taken place in the federal case, we perceive little, if any, threat to our traditions of comity and federalism."

Seventh Circuit: First-to-File

As pointed out above, the Seventh Circuit, speaking through now Justice Stevens, has applied an iron-clad, first-to-file rule in *Barancik*, 489 F.2d at 938.

Eighth Circuit: Fifth Circuit, Comity

The Eighth Circuit approved of the Fifth Circuit's reasoning in *Royal* when holding that a District Court had discretion to hear a declaratory judgment action which predated a state action. *Prudential Ins. Co. of America v. Doe*, 140 F.3d 785, 788 (8th Cir. 1998).

The Sixth Circuit never considered the merits of these decisions but relied instead on its controversial and long standing *Roth* decision. In applying the Anti-Injunction Act, most circuits, other than the Sixth, make some type of exception for first-filed declaratory judgment actions, particularly when a federal question is involved.

The United States Supreme Court should resolve this conflict between the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Circuits.

CONCLUSION

The Anti-Injunction Act regulates an important intersection between the federal and state courts, albeit with language that is at once opaque and transparent. The exceptions contained in the statute are far clearer than the statute itself. The Sixth Circuit in its *Roth*, and now *Martingale* decisions, has greatly expanded the scope of the Anti-Injunction Act beyond its plain meaning. In so doing, the Sixth Circuit has placed itself at odds with five

other circuits. Those circuits, while disagreeing with *Roth*, and now *Martingale*, have in turn adopted at least three different interpretations of the Anti-Injunction Act which are themselves, contradictory.

Following the initial issuance of the *Roth* decision, the United States Supreme Court decided to resolve the conflict that then existed between the Sixth and Seventh Circuits. See, *Roth v. Bank of Commonwealth*, *cert. granted*, 440 U.S. 944 (1979), *cert. dismissed*, 442 U.S. 925 (1979).

An even stronger reason exists today to resolve the striking conflicts between the circuits, particularly in view of the more recent decisions from the First, Third, Fifth and Eighth Circuits which have further splintered the interpretation and application of the Anti-Injunction Act.

For the foregoing reasons, the Petitioner respectfully prays that its Petition for a writ of certiorari be granted.

Respectfully submitted,

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361 F.3d 297

United States Court of Appeals,
Sixth Circuit.

MARTINGALE LLC; Bridge the Gap, Inc.,
Plaintiffs-Appellants,
v.
CITY OF LOUISVILLE;
Waterfront Development Corporation,
Defendants-Appellees.

No. **02-5895.**

Argued: Oct. 22, 2003.
Decided and Filed: March 17, 2004.
Rehearing Denied April 14, 2004.

Donald L. Cox (argued and briefed), William H. Mooney (briefed), Christina M. Heavrin, Lynch, Cox, Gilman & Mahan, Louisville, KY, Theodore L. Mussler, Jr. (briefed), Mussler & Associates, Louisville, KY, for Plaintiffs-Appellants.

John L. Tate (argued and briefed), Emily R. Hartlage (briefed), Stites & Harbison, Louisville, KY, J. David Morris (briefed), City of Louisville, Louisville, KY, Jason P. Thomas, Stites & Harbison, Frankfort, KY, for Defendants-Appellees.

Before: BOGGS, Chief Judge; GIBBONS, Circuit Judge; GWIN, District Judge.*

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

GWIN, District Judge.

In this case, Martingale, LLC ("Martingale") and Bridge the Gap, Inc. ("Bridge the Gap") appeal the district court's ruling permitting the City of Louisville ("City") and the Waterfront Development Corporation to condemn a structure known as the Big Four Bridge. The Big Four Bridge connects Jeffersonville, Indiana with Louisville, Kentucky. The City and the Waterfront Development Corporation wish to use the bridge as part of a public park, but Martingale and Bridge the Gap contend that the City has no legal power to condemn the bridge.

For the following reasons, the district court's decision is AFFIRMED.

I. Background

The story of this case begins in 1888, when the Kentucky General Assembly chartered the Louisville and Jeffersonville Bridge Company ("Bridge Company"). The Bridge Company's charter provided it the "right and power to construct, maintain and operate" a bridge to make rail connections between the railroad lines on each side of the Ohio River. A year later, the Bridge Company approved final plans for the bridge, and in 1895, construction was completed.

In 1927, the Cleveland, Cincinnati, Chicago, and St. Louis Railroad Company (known as the "Big Four Railroad Company") acquired an interest in the bridge from the Bridge Company. Over the following two years, the bridge and its approaches were rebuilt. Years later, in 1955, the

Bridge Company and Big Four merged, making Big Four the bridge's sole owner and the operator.

Through a series of subsequent mergers, Big Four became a part of the Penn Central Transportation Company ("Penn Central"). In 1968, Penn Central decided that due to its merger with the New York Central Railroad Company, certain rail lines were surplus, and that continuing to operate these lines would be a "financial burden . . . and an undue burden on interstate commerce." The rail line crossing the bridge was one such line. A year later, the Interstate Commerce Commission ("ICC") approved Penn Central's application to abandon the bridge. In 1969, the rail line spanning the bridge was thus abandoned.[1]

Five years later, the bridge's approaches were removed. The bridge remains in this condition today, completely inaccessible to humans. For the past thirty years, the bridge has not been functional.

The bridge's abandonment did not stop the transfer of the bridge. Penn Central Transportation Company went bankrupt in 1970 and transferred all of its properties other than operating railroads to the Penn Central Corporation. But the Penn Central Corporation did not keep the bridge, either. In 1982, Charles R. Hammond ("Hammond") acquired the bridge and then transferred it to the Louisville and Jeffersonville Bridge Corporation

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[1] The record is not clear on what exactly was abandoned. One way to read the record indicates that only the rail line was abandoned, and that the ICC proceeding had no effect on the bridge. Another interpretation holds that Penn Central abandoned the bridge when it abandoned the rail line. Regardless, this ambiguity does not affect our resolution of the case.

("Bridge Corporation"), of which he was president. Hammond then transferred all of the real property associated with the bridge, but not the bridge itself, to the Kentucky Real Estate Holding Corporation.

In 1987, Bridge the Gap acquired the bridge at a Sheriff's sale for $10,300. The Waterfront Development Corporation purchased the real estate surrounding the bridge pylon on the Kentucky side of the river in 1995. In 2000, Bridge the Gap sold its interest in the bridge to Martingale for $400,000, retaining only the right to display holiday lights on the bridge for a ten-year period.[2]

Hoping to use the bridge as a pedestrian walkway as a part of the City's Waterfront Park, the City of Louisville passed a resolution authorizing condemnation of the bridge on November 28, 2000. In April 2001, Bridge the Gap and Martingale sued in the United States District Court for the Western District of Kentucky. Their suit sought a declaratory judgment of their right to insulate the bridge from condemnation, an injunction restraining the City of Louisville and the Waterfront Development Corporation from condemning the bridge, compensatory damages, costs, and attorneys' fees. In July 2001, the City filed suit in Kentucky state court to condemn the bridge.

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[2] Because the sale contract was contingent upon the grant of certain permits from the City and the Waterfront Development Corporation, the sale may not have been consummated. However, Martingale apparently has at least an equitable lien on the Bridge under the terms of the contract.

On June 5, 2002, the district court entered summary judgment in favor of the City and the Waterfront Development Corporation. The court reasoned that: (1) the bridge is not in interstate commerce; (2) the Rivers and Harbors Act does not prohibit condemnation of the bridge; (3) the bridge's status as a post route does not prohibit condemnation; and (4) the plaintiffs' alleged franchises had been forfeited in 1969 when the ICC permitted Penn Central to abandon the bridge. Additionally, the district court held that even if the plaintiffs possessed the alleged franchises, this was no bar to condemnation because the City and the Waterfront Development Corporation could condemn the franchises and pay the plaintiffs reasonable compensation for them. Plaintiffs Martingale and Bridge the Gap now appeal the district court's grant of summary judgment.

II. Summary of the Parties' Arguments

Martingale and Bridge the Gap argue that summary judgment was inappropriate because they presented enough evidence to the district court to create issues of material fact with regard to: (1) whether the bridge is in interstate commerce, and if so, whether the City's attempt to condemn it is an impermissible burden on interstate commerce; (2) whether the bridge and any franchises to operate it were abandoned as a matter of law under the ICC's procedures for abandoning a rail line; (3) whether a municipality in Kentucky can condemn a federal, Kentucky, or Indiana franchise to own and operate bridge over the Ohio River; and (4) whether the City of Louisville can condemn personal property for use in a park.

The City of Louisville and the Waterfront Development Corporation respond by arguing that there are no issues of material fact regarding any of the above-mentioned issues, and that the district court correctly granted judgment in their favor as a matter of law. Additionally, the City and the Waterfront Development Corporation say that the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits this Court from enjoining a state court condemnation proceeding.

The Court analyzes these arguments below.

III. Standard of Review

An appellate court reviews a district court's grant of summary judgment *de novo*. *Doren v. Battle Creek Health Sys.*, 187 F.3d 595, 597 (6th Cir.1999). Summary judgment is appropriate where the evidence submitted shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party's case. *Waters v. City of Morristown*, 242 F.3d 353, 358 (6th Cir.2001). A fact is material if its resolution will affect the outcome of the lawsuit. *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 597 (6th Cir.1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Once the moving party satisfies its burden, the burden shifts to the non-moving party to set forth specific facts showing a triable issue. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). It is not sufficient for the non-moving

party merely to show some possibility of doubt as to the material facts. *Id.*

In deciding a motion for summary judgment, the court views the factual evidence and draws all reasonable inferences in favor of the non-moving party. *National Enters., Inc. v. Smith,* 114 F.3d 561, 563 (6th Cir.1997). Ultimately the Court must decide "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Terry Barr Sales Agency, Inc. v. All-Lock Co.,* 96 F.3d 174, 178 (6th Cir.1996) (internal quotations omitted).

IV. Analysis

The City and the Waterfront Development Corporation assert that even if Martingale and Bridge the Gap's arguments are meritorious, the federal Anti-Injunction Act, 28 U.S.C. § 2283, barred the district court from granting the requested relief. If the City and the Waterfront Development Corporation are correct, then we need not reach the merits of the case with respect to Martingale and Bridge the Gap's claims for declaratory and injunctive relief. For this reason, we open our analysis with this issue.

The district court did not address the Waterfront Development Corporation and the City's Anti-Injunction Act argument. Regardless, this Court may consider it. This would be the case even if the parties did not raise the issue. *See, e.g., Gloucester Marine Rys. Corp. v. Charles Parisi, Inc.,* 848 F.2d 12, 15 (1st Cir.1988); *Hickey v. Duffy,* 827 F.2d 234, 243 (7th Cir.1987).

According to the City and the Waterfront Development Corporation, the Anti-Injunction Act forbade the district court from granting the relief that Martingale and Bridge the Gap requested. The City and the Waterfront Development Corporation claim that the Anti-Injunction Act bars relief because Martingale and Bridge the Gap seek injunctive relief and because their claims do not fit into any of the Anti-Injunction Act's three exceptions.

In response, Martingale and Bridge the Gap assert that the Anti-Injunction Act is inapplicable because they seek declaratory relief in addition to an injunction. Additionally, they argue that the Anti-Injunction Act cannot apply because they requested that the injunction be directed against the City and the Waterfront Development Corporation, not against the state courts. Finally, Martingale and Bridge the Gap assert that the Anti-Injunction Act does not prohibit injunctions that forbid the commencement of state court proceedings.

We now turn to these arguments, using the text of the Anti-Injunction Act as a starting point. The Anti-Injunction Act states in full:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283. The Supreme Court has, on several occasions, recognized that the Anti-Injunction Act creates "an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs,* 398 U.S. 281, 286-87, 90

S.Ct. 1739, 1743, 26 L.Ed.2d 234 (1970); *see also Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31, 97 S.Ct. 2881, 2886, 53 L.Ed.2d 1009 (1977). These three exceptions, embedded within the statute's text, permit injunctions against state court proceedings (1) where Congress expressly authorizes, (2) where necessary in aid of the court's jurisdiction, and (3) where necessary to protect or effectuate the court's judgments. *See* 28 U.S.C. § 2283.

Martingale and Bridge the Gap fit into none of the Act's exceptions. First, the parties do not assert, nor do we find, that Congress expressly authorizes injunctions against state courts in the Rivers and Harbors Act, 33 U.S.C. §§ 401 *et seq.*

Second, the injunction they seek is not necessary in aid of the court's jurisdiction. Courts have applied this second exception in only two scenarios: where the case is removed from the state court, and where the federal court acquires in rem or quasi in rem jurisdiction over a case involving real property before the state court does. *See, e.g.*, 17 Wright, Miller, & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 4225, at 528 (1988); Erwin Chemerinsky, *Federal Jurisdiction*, § 11.2.3, at 699-700 (3d ed.1999). Neither of these scenarios applies in this case.[3] Further, the existence of a federal right not to have

[3] Although this case does involve aspects of real property law, jurisdiction over these parties is based on in personam, rather than in rem, principles. Therefore, the "in aid of jurisdiction" exception does not apply. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977) (declining to apply the "necessary in aid of jurisdiction" exception where the federal and state actions were based on in personam jurisdiction, and noting that "[t]he traditional notion is that in personam actions in federal and state court may

(Continued on following page)

property taken without just compensation does not render equitable relief necessary in aid of the federal courts' jurisdiction. First of all, Martingale and Bridge the Gap have failed to show a violation of this right. Second, the Supreme Court has noted that "when a state proceeding presents a federal issue, even a pre-emptive issue, the proper course is to seek resolution of that issue by the state courts." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50, 108 S.Ct. 1684, 1691, 100 L.Ed.2d 127 (1988).

Finally, because there has been no prior federal court decision on the matter of the bridge, Martingale and Bridge the Gap cannot show that an injunction would be "necessary to promote or effectuate [the court's] judgments."

Martingale and Bridge the Gap's arguments against applying the Anti-Injunction Act are unavailing. They argue that the Anti-Injunction Act may bar their request for an injunction, but not their claim for declaratory relief. Martingale and Bridge the Gap's argument is clever, but unpersuasive. Their ultimate goal is to halt the state court condemnation proceedings, a result that

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proceed concurrently, without interference from either court, and there is no evidence that the exception to § 2283 was intended to alter this balance."); *see also In re Am. Honda Motor Co., Inc., Dealerships Relations Litig.*, 315 F.3d 417, 439 (4th Cir.2003) ("The 'necessary in aid of its jurisdiction' exception to the Anti-Injunction Act is widely understood to apply most often when a federal court was the first in obtaining jurisdiction over a *res* in an *in rem* action and the same federal court seeks to enjoin suits in state courts involving the same *res.*"); *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 806 (9th Cir.2002) (indicating that the most prominent form of the "in aid of jurisdiction" exception is for in rem actions); *In re Diet Drugs*, 282 F.3d 220, 234 (3d Cir.2002).

either an injunction or a declaratory judgment would accomplish equally well. Other parties have tried this ruse, and most courts that have addressed this issue have rejected their argument. *See, e.g., Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788 (5th Cir.2000), *cert. denied* 530 U.S. 1274, 120 S.Ct. 2740, 147 L.Ed.2d 1005 (2000); *U.S. Steel Corp. Plan for Employee Ins. Benefits v. Musisko,* 885 F.2d 1170, 1175 (3d Cir.1989), *cert. denied,* 493 U.S. 1074, 110 S.Ct. 1121, 107 L.Ed.2d 1028 (1990); *Gloucester Marine Rys. Corp.,* 848 F.2d at 15; *Texas Employers' Ins. Ass'n v. Jackson,* 862 F.2d 491, 498-99 (5th Cir.1988) (en banc), *cert. denied,* 490 U.S. 1035, 109 S.Ct. 1932, 104 L.Ed.2d 404 (1989); *Bledsoe v. Fulton Bank,* 940 F.Supp. 804, 808 (E.D.Pa.1996). This Court follows the guidance of these courts and determines that where, as here, declaratory relief would have the same practical effect as an injunction, the Anti-Injunction Act precludes the court from granting a declaratory judgment.

Additionally, Martingale and Bridge the Gap argue that the Anti-Injunction Act does not prevent a court from enjoining the parties from *commencing* state court proceedings, as opposed to enjoining the parties from *proceeding with* already-filed state actions. They are correct. However, this is of no moment to the instant case because the City filed its condemnation action in July 2001. Because the condemnation action has been pending since that time, the Anti-Injunction Act prohibits any federal court from granting the declaratory or injunctive relief that Martingale and Bridge the Gap seek. In other words, an injunction issued anytime after July 2001 would not prevent the parties from commencing state court litigation; it would stop the parties from proceeding with

existing state court litigation, which is exactly what the Anti-Injunction Act prohibits.

The Court finds support for this analysis in its own precedent. In *Roth v. Bank of the Commonwealth,* 583 F.2d 527 (6th Cir.1978), state court litigation commenced after the federal suit was filed. The district court relied on a Seventh Circuit precedent to grant an injunction.

This Court reversed, concluding,

> we are led inevitably to the conviction that the logic of [the Seventh Circuit's opinion in] *Barancik* [*v. Investors Funding Corp.*, 489 F.2d 933 (7th Cir.1973)] (which in effect says that state proceedings which are commenced in fact are not commenced in law if commenced after the time the judicial power of the federal court was invoked) amounts to precisely that type of judicial improvisation which the Supreme Court has warned us to avoid.

Id. at 534. Therefore, the fact that the City did not file the state court lawsuit until after Bridge the Gap and Martingale filed suit in the federal district court has no bearing on the applicability of the Anti-Injunction Act. For these reasons, we conclude that the Anti-Injunction Act applies and that the district court lacked the power to grant Martingale and Bridge the Gap's requested injunctive and declaratory relief.

The injunctive and declaratory relief sought by Martingale and Bridge the Gap is clearly the heart of this case. Yet, included in the prayer for relief in plaintiffs' "Complaint for Declaration of Rights and Injunctive Relief" is a request for compensatory damages and attorneys' fees. A brief mention of monetary injury "in the form of lost

business opportunities and attorneys fees" is included elsewhere in the complaint. The complaint alleges no further facts in support of this relief and fails to allege any claim or theory of recovery for which plaintiffs seek compensatory damages or attorneys' fees.[4] The complaint fails to allege a claim for intentional interference with prospective contractual relations under Kentucky law. *See Nat'l Collegiate Athletic Ass'n v. Hornung,* 754 S.W.2d 855, 858-59 (Ky.1988) (requiring allegations of an improper motive, consisting of malice or some wrongful conduct on behalf of defendant). Likewise, the complaint fails to allege a claim for a Takings Clause violation. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) (requiring an allegation of a deprivation of due process or a denial of fair compensation). Because this stray request for monetary relief is not accompanied by any alleged claim on which the relief could be based, our determination that the Anti-Injunction Act bars declaratory and injunctive relief concludes the case. It is unnecessary for us to reach the issues on which the district court based its decision.

We therefore AFFIRM the district court's decision to grant summary judgment in favor of the City of Louisville and the Waterfront Development Corporation.

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[4] Moreover, the appellate briefs do not mention compensatory damages or attorney's fees.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

MARTINGALE, LLC, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:01CV-255-S

CITY OF LOUISVILLE, et al. DEFENDANTS

MEMORANDUM OPINION

This action seeks to enjoin the City of Louisville ("the City") from condemning the structure known as the Big Four Bridge ("the Bridge")[1], which spans the Ohio River between Louisville, Kentucky and Jeffersonville, Indiana. The plaintiffs, Martingale, LLC and Bridge the Gap, Inc. (collectively "the plaintiffs") contend that the City does not have the legal authority [sic] condemn the Bridge. The City and the Waterfront Development Corporation, both defendants, move for summary judgment on the ground that there is no legal impediment to condemnation because the Bridge is an abandoned structure.

A party moving for summary judgment has the burden of showing that there are no genuine issues of fact and that the movant is entitled to summary judgment as a matter of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151 60, 90 S. Ct. 1598, 16 L. Ed. 2d 142 (1970); *Felix v. Young*, 536 F.2d 1126, 1134 (6th Cir. 1976). Not every

[1] The complaint seeks declaratory and injunctive relief. There was no condemnation action pending at the time this action was filed. The City has since filed such a suit.

factual dispute between the parties will prevent summary judgment. The disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). The dispute must also be genuine. The facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the non-moving party. *Id.* at 2510. The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968). The evidence must be construed in a light most favorable to the party opposing the motion. *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962).

I. Facts

The pertinent facts in this matter are undisputed.

In 1872, Congress authorized the United States Secretary of War to permit bridges to be erected across the Ohio River for various uses including railroad transportation.[2] In 1888, the Kentucky General Assembly chartered the Louisville and Jeffersonville Bridge Company (the "Bridge Company").[3] The General Assembly granted the Bridge Company "the right and power to construct, maintain and operate" a bridge to make rail

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[2] Act of December 17, 1872, Ch. IV, 17 Stat. 398.

[3] 1888 Ky. Acts 212.

connections between the lines of railroad on each side of the Ohio River.[4] In February, 1889, the plans of the Bridge Company for the construction of the Bridge were approved.[5] The Bridge was completed in 1895.

On October 4, 1927, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company (known as the "Big Four") became the sole owner of the Bridge Company.[6] In 1928 and 1929, the bridge and approaches were rebuilt.[7] The Bridge Company operated the property until March 2, 1955, when the Bridge Company was merged into the Big Four which became the Bridge's owner.[8] Beginning on February 1, 1968, Penn Central Company became an additional authorized operator of the Bridge.[9] In late 1968, Big Four and Penn Central Company filed an application with the United States Interstate Commerce Commission ("ICC") to abandon the Bridge on the ground that its continued operation would constitute a "financial burden . . . and an undue burden on interstate commerce."[10] The abandonment was sought "because the merger of the former New York Central Railroad Company . . . into . . . Penn Central has made said segments of line, which include a bridge across the Ohio River, surplus facilities no longer needed for the present and future convenience of

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[4] *Id.* and ICC Abandonment Application and Questionnaire, 2A.

[5] Declaration of William C. Endicott, Secretary of War, February 28, 1889.

[6] ICC Abandonment Application and Questionnaire, 2A.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Application for Abandonment, pg. 12, ¶ 18A.

the public."[11] The ICC approved the abandonment on May 1, 1969, concluding that

> operations are no longer needed over these lines as service is furnished over alternate facilities of applicant; that no user will be adversely affected by the abandonments; that substantial savings will result to applicants upon abandonments; and that continued maintenance and operation of the lines would impose an undue and unnecessary burden on applicant and upon interstate commerce.[12]

In 1974, the approaches to the Bridge were removed, leaving only the piers and superstructure of the Bridge. The removal of the approaches rendered the Bridge inaccessible and unusable.

On October 16, 1987, Bridge the Gap, Inc. purchased the Bridge at a sheriff's sale. It did not acquire any real property on the Kentucky shore; only the piers in the river and the bridge superstructure such as it was, unconnected to any approach on either end.[13]

On February 16, 1995, the Waterfront Development Corporation ("WDC") purchased the real property on the Kentucky side of the Ohio River adjacent to the Bridge.[14]

WDC later unsuccessfully sought to purchase Bridge the Gap's interest in the Bridge, but on December 7, 2000,

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[11] Application for Abandonment, pg. 2, ¶ e.

[12] Certificate and Order of Abandonment, May 1, 1969.

[13] Jefferson Circuit Court Orders of November 24, 1987 and May 9, 1988.

[14] Deed, Kurt Bendl to WDC, February 16, 1995.

Bridge the Gap sold its interest to Martingale, LLC, retaining the right to display holiday lights on the Bridge for a period of ten years.[15]

WDC envisions the renovation and development of the Bridge as a pedestrian bridge linking Louisville with Jeffersonville as part of its development of Louisville's Waterfront Park.

II. Analysis

Having been unable to negotiate the purchase of the Bridge from either Bridge the Gap or Martingale, LLC, the City, on behalf of WDC, sought to acquire it by condemnation. Kentucky Revised Statutes ("KRS") 97.257 states:

> Whenever property shall be needed by any city of the first class for any park, playground, or community center purpose contemplated in KRS 97.250 to 97.257, either within or beyond the boundaries of such city, in the county in which such city is located, the director of parks and recreation may, with the consent of the legislative body of such city, order the condemnation of such property in the manner provided in the Eminent Domain Act of Kentucky.

The Eminent Domain Act, KRS 416.540, et seq., provides:

> Whenever any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed for any of the uses or purposes for which the condemnor is

[15] Contract of Sale, Bridge the Gap, Inc. to Martingale, LLC, December 15, 2000.

> authorized by law, to exercise its right of eminent domain, the condemnor may condemn such property, property rights, privileges or easements pursuant to the provisions of KRS 416.550 to 416.670.

KRS 416.550[16]

A.

The plaintiffs contend that the City cannot condemn a bridge that is in interstate commerce. They rely to section 401 of the Rivers and Harbors Act, 33 U.S.C. § 401, et seq., for the proposition that it is not within the power of either state or local government to effect the condemnation of a bridge over navigable waters which forms a part of interstate commerce.

First, the contention that the Bridge is in interstate commerce is ludicrous. The structure is usable only by pigeons and other winged creatures. It is inaccessible to humans, except those with extremely long ladders. The Bridge has not been in use as a means of transportation across the river for over 30 years. The approaches having been removed, the Bridge cannot be used as a means of transporting goods or people.

The Bridge was formally abandoned by the ICC, which concluded that continued maintenance and operation would constitute an undue burden on interstate commerce. When the ICC's regulatory control over the

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[16] The plaintiffs would have the court limit the right of condemnation to real property. The plain language of the statute does not suggest such a limitation and this court will decline to give it such a reading.

Bridge was relinquished, interstate commerce ceased. *Hayfield Northern R.R. Co. v. Chicago & Northwestern Transportation Co.*, 404 S.Ct. 2610 (1984).[17] We reject utterly the notion that the Bridge forms any part of interstate commerce.

Second, the plaintiffs have failed to demonstrate that the Rivers and Harbors Act prohibits the City's condemnation of the Bridge. No specific section of the Act is cited, and possibly for good reason. Our own review indicates that the Act does not prohibit condemnation. We conclude that the plaintiffs' reliance on the Rivers and Harbors Act is misplaced.

B.

The plaintiffs contend that condemnation is precluded by the Commerce Clause and the Post Roads Clause of the United States Constitution.[18] Bridges built over navigable waters were designated as "post routes," in accordance with the Act of Dec. 17, 1872, ch. IV, 17 Stat. 398 and the Bridge Act of 1906.[19] The plaintiffs argue that once a post route is designated, it is in interstate commerce and cannot thereafter be condemned. No authority is cited for this proposition.

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[17] We reject the contention that the December display of holiday lights on the remaining bridge structure constitutes ongoing commercial use of the Bridge in interstate commerce.

[18] U.S. Const. Art. I, § 8, cl. 3 and cl. 7.

[19] 33 U.S.C. § 492.

Designation of the Bridge as a post route in the late 1800s does not preclude its abandonment and condemnation in 2002 after many years of disuse. We find nothing in the Constitution which requires the perpetuation of an inaccessible, abandoned bridge structure in order to preserve a long-unused post route designation.

C.

The plaintiffs claim that franchises from the United States and from the states of Kentucky and Indiana preclude condemnation of the Bridge. They urge that these franchises, granted to construct and operate the Bridge, remain viable and have passed with the structure to its current owner. The plaintiffs have provided a copy of the Kentucky legislation granting franchise rights to the Bridge Company to operate the Bridge and to collect tolls.[20] They have also provided a copy of generalized legislation from the State of Indiana authorizing the formation of associations for the purpose of building bridges and collecting tolls. The Indiana statute is not specific to the bridge in question here, but was applicable to it.[21] The plaintiffs contend that once granted, these franchises are perpetual and may not be terminated by the City. For a number or [sic] reasons, the court finds this argument unavailing.

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[20] Acts of the General Assembly, KY, § 2 (1888).

[21] Indiana General Laws, Chapter VIII, March 2, 1875.

(1)

The cases cited by the plaintiffs involved franchises that were operational at the time revocation or restriction of the franchise was attempted. *See, ie., City of Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U.S. 649, 32 S.Ct. 572, 56 L.Ed, 934 (1912) (city attempted to revoke franchise for telephone systems); *Grand Trunk R.R. Co. v. City of South Bend*, 227 U.S. 544, 33 S.Ct. 303, 57 L.Ed. 633 (1913) (city sought to preclude the laying of additional track by holder of franchise for freight and passenger trains); *Williams v. Citizens' Ry. Co.*, 29 N.E. 408 (Ind. 1891) (franchise holder for electric street railway sought to preclude relocation of a building that would destroy railway's wires and poles).

In this instance, the claimed franchise rights are for the transport of goods and persons across the Ohio River and for the collection of tolls. These are rights which have not been exercised since the ICC approved abandonment over 30 years ago. The Bridge has been inaccessible for over 25 years. The facts here differ markedly from those cases cited by the plaintiffs.

(2)

We believe that the franchises were forfeited in 1969 when the application for abandonment of the Bridge was granted by the ICC. The ICC declared at the time that continued operation of the Bridge would constitute an undue burden on interstate commerce and should no longer be permitted. A franchise may be deemed forfeited when it ceases to serve the public. In *Jack v. Williams*, 113 F.823 (D.S.C. 1902), the court stated:

> If a corporation is created, the franchise to be a corporation can be given only by the sovereign . . . The consideration for these acts of the sovereign is the utility of the enterprise to the public. To be thus useful to the public, the road must be kept in such a condition that life and property both must be made as safe as practicable . . . Whilst thus serving the public, however, no corporation or private person is obliged to continue the service without a reasonable remuneration . . . The question is not as to the existence of the duty, but as to its extent and qualifications. The duty of a railroad company is not more than to meet the public wants. If trains run at reasonable and moderate fares, and cannot be supported, it is because they are not needed . . . In such case the company may cease operating the road, unless this be contrary to the express terms of the charter . . . [T]hey exercised this option, and forfeited the franchises . . .

Jack, 113 F. at 826-31.[23]

(3)

The City contends that it does not seek to revoke the franchises. Rather, it seeks to acquire any existing rights, including franchise rights, by eminent domain. In *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893), where a lock and dam were

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[23] The plaintiffs suggest that the franchises should be deemed perpetual because the association formed under the Indiana grant was perpetual in duration. They cite no authority for the contention that the duration of the life of the association defines the duration of a franchise granted by a state or the Federal government.

condemned, payment of compensation for the value of an attendant active franchise was authorized. So, even if the franchises were not forfeited, their value, if any, can be qualified and compensated in the condemnation litigation. We conclude that, if the franchises still exist, they are no bar to eminent domain proceedings.

III. Conclusion

The defendants are entitled to summary judgment as to all claims in the amended complaint. A separate order will be entered herein this date in accordance with this opinion.

This 5th day of June, 2002.

/s/ _____
CHARLES R. SIMPSON III,
JUDGE
UNITED STATES DISTRICT
COURT

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

MARTINGALE, LLC, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:01CV-255-S

CITY OF LOUISVILLE, et al. DEFENDANTS

ORDER

Motions having been made and for the reasons set forth in the memorandum opinion entered herein this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that

1. The motion of the plaintiffs, Martingale, LLC, et al., for leave to file a supplemental brief is **GRANTED**.

2. The motion of the defendants, City of Louisville, et al., for summary judgment is **GRANTED**.

3. The motion of the plaintiffs, Martingale, LLC, et al., for leave to file a second amended complaint is **DENIED AS FUTILE**.

4. The amended complaint is **DISMISSED WITH PREJUDICE**.

There being no just reason for delay in its entry, this is a final order.

IT IS SO ORDERED this 5th day of June, 2002.

/s/ _____
CHARLES R. SIMPSON III,
JUDGE
UNITED STATES DISTRICT
COURT

cc: Counsel of Record

Case No: 02-5895

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
ORDER

(Filed Apr 14, 2004)

MARTINGALE LLC; BRIDGE THE GAP, INC.

Plaintiffs-Appellants

v.

CITY OF LOUISVILLE; WATRFRONT DEVELOPMENT CORPORATION

Defendants-Appellees

BEFORE: BOGGS, Chief Judge, GIBBONS, Circuit Judges and GWIN, District Judge*

Upon consideration of the petition for rehearing filed by the appellant, Martingale LLC.

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

*The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

(2)

No. 04-60

Supreme Court, U.S.
FILED
SEP 23 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARTINGALE, LLC,

Petitioner,

v.

THE CITY OF LOUISVILLE; WATERFRONT DEVELOPMENT CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When a District Court grants summary judgment dismissing on the merits an action for declaratory judgment and injunctive relief seeking to bar a state court condemnation proceeding, and does so without addressing application of the Anti-Injunction Act, 28 U.S.C. § 2283, and the Circuit Court of Appeals affirms the summary judgment on the Anti-Injunction Act alone, is the case appropriate for Supreme Court review of nominal but irrelevant differences in the Circuits' application of the Anti-Injunction Act?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The respondents have no parent companies and no non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

I. Procedural History of the Case

Bridge the Gap and Martingale filed the underlying complaint and amended complaint seeking a declaration of rights and injunctive relief. They sought a declaration from the trial court that the City of Louisville (the "City") and the Waterfront Development Corporation ("WDC") do not have legal authority to condemn the structure and piers of the Big Four Bridge (the "Bridge"), a former railroad bridge spanning the Ohio River between Louisville, Kentucky, and Jeffersonville, Indiana, the approaches to which were razed thirty years ago. Bridge the Gap and Martingale also sought an order from the trial court enjoining the City and WDC from proceeding with a state condemnation action against the Bridge.[1] At no time did the Petitioners below request or obtain an injunction hearing in the trial court pursuant to Fed. R. Civ. Pro. 65.

Bridge the Gap and Martingale asserted that the City is prohibited from condemning the Bridge because: (1) the Bridge is part of interstate commerce; (2) federal law regulates bridges over navigable waters; (3) the Bridge is a postal route and condemnation of the Bridge will interfere with the delivery of mail; (4) the City cannot condemn the Bridge as personal property; and (5) Bridge the Gap and Martingale have a franchise and the City cannot condemn a franchise.

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[1] Martingale's petition for a writ of certiorari is mistaken in stating that "Martingale had sought only a declaratory judgment." Petition at 4. Both paragraph 22 of the Amended Complaint and paragraph 2 of the *ad damnun* request. "An injunction restraining and enjoining Defendants, City of Louisville and Waterfront Development Corporation[,] from condemning the Big Four Bridge."

The City and WDC filed a motion for summary judgment on each and every substantive claim, adding for good measure an argument that plaintiffs' prayer for injunctive relief violated the Anti-Injunction Act, 28 U.S.C. § 2283. The trial court granted the motion for summary judgment on all of Martingale's and Bridge the Gap's claims. Appendix to Martingale's Petition for Writ of Certiorari ("App.") at 14-24. The trial court ruled that "the contention that the Bridge is in interstate commerce is ludicrous." App. at 19. The trial court held that the Rivers and Harbors Act does not prohibit condemnation of the Bridge, and the designation of the Bridge as a post route in the 1800s does not preclude the City from condemning the Bridge after more than thirty years of nonuse. App. at 20-21. The court also rejected the claim that Bridge the Gap owned franchise rights related to the Bridge. App. at 21-24. Having thus disposed of all the substantive claims, the trial court was not moved to consider the import of plaintiffs' request for injunctive relief.

Bridge the Gap and Martingale appealed the trial court's summary judgment order. The U. S. Court of Appeals for the Sixth Circuit affirmed, choosing to uphold summary judgment on the sole ground that the Anti-Injunction Act prohibited the trial court from enjoining the state court condemnation proceeding. App. at 1-13. It found "clever but unpersuasive" Petitioner's argument that, although the Anti-Injunction Act "may bar their request for an injunction," it did not bar a claim for declaratory judgment, since the ultimate goal with either was to halt the condemnation proceeding. App. at 10. Because the Sixth Circuit found the Anti-Injunction Act dispositive, the court concluded there was no need to address the merits of Petitioner's claims.

Although both Bridge the Gap and Martingale pursued this action at the trial court level and before the Sixth Circuit, only Martingale petitioned for writ of certiorari to this Court.

II. Factual Background

A. History of the Big Four Bridge

In 1888, the Kentucky General Assembly chartered the Louisville and Jeffersonville Bridge Company. *See* 1888 Ky. Acts, ch. 212. The General Assembly granted the Louisville and Jeffersonville Bridge Company the "right and power to construct, maintain and operate a bridge . . . and to charge, demand and receive tolls for the use thereof." *Id.* at § 2. The General Assembly also granted the Louisville and Jeffersonville Bridge Company the authority to "enjoy all corporate powers, privileges and franchises necessary or proper to enable [it] to carry out and execute the purposes hereinafter designated." *Id.* at § 1.

The United States Secretary of War permitted bridges to be erected across the Ohio River for railroad and other uses, including use as a post route. Act of December 17, 1872, Ch. IV, 17 Stat. 398. The 1872 Act provides that "any persons or corporations, having lawful authority therefor, may hereafter erect bridges across the Ohio River, for railroad or other uses. . . ." The Act, however, does not grant a franchise in connection with the construction of bridges.

The Louisville and Jeffersonville Bridge Company constructed the Bridge in question between 1888 and 1895. In 1927, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company ("the Big Four") purchased the Bridge.

In 1968, after over 70 years of operation, the Big Four filed an application with the United States Interstate Commerce Commission to abandon the Bridge. The Big Four represented to the ICC that, since a new replacement bridge was in service just west of the Bridge, the continued operation of the Bridge "would constitute a financial burden . . . and an undue burden on interstate commerce." On May 1, 1969, the Interstate Commerce Commission approved the application to abandon the Bridge, concluding that "the continued maintenance and operation of the [Bridge] would impose an undue and unnecessary burden on applicant and upon interstate commerce."

In 1974, the approaches to the Bridge were razed, leaving only the piers and superstructure of the Bridge without provision for any access from either the Kentucky or Indiana shore. As the trial court recognized, the Bridge today is "inaccessible to humans, except those with extremely long ladders." App. at 19.

On October 16, 1987, Bridge the Gap, Inc., purchased the Kentucky portion of the Bridge superstructure for $10,300 at a Jefferson County, Kentucky, sheriff's sale. Bridge the Gap's purchase of the Bridge soon became the subject of a lawsuit in the Jefferson Circuit Court. The Jefferson Circuit Court eventually concluded that Bridge the Gap owned the Bridge superstructure only, that the Bridge had been severed from the abutting real property, and that the Bridge superstructure was personal property.

On December 7, 2000, Bridge the Gap entered into an agreement to sell the Bridge to Martingale for $400,000. The contract of sale entered into by Bridge the Gap and Martingale makes no reference to a franchise.

The WDC owns the real property under the portion of the Bridge located in Kentucky, and the City of Jeffersonville, Indiana, owns the real property under the portion of the Bridge located in Indiana. Neither Bridge the Gap nor Martingale possesses any easement, right, or license, either recorded or unrecorded, permitting them to maintain the Bridge on WDC's property or to have any right or privilege of ingress or egress across the WDC's property to obtain access to the Bridge.

B. Development of Waterfront Park

In the 1990's, WDC began development of Waterfront Park in the City of Louisville. Part of the initial plans for Waterfront Park included the conversion of the Big Four Bridge into a pedestrian walkway across the Ohio River. The City began negotiating with Bridge the Gap and Martingale to acquire their interests in the Bridge. The WDC was unable to obtain these interests by voluntary agreement. Bridge the Gap publicly stated that the only way the City could acquire the Bridge was through a condemnation action. In the interval since the District Court's summary judgment, Bridge the Gap withdrew its opposition to condemnation of the Bridge. Thus, only Martingale filed the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. The Issue of Whether the Anti-Injunction Act Bars Martingale's Federal Action Is Entirely Collateral and Not Dispositive.

This case involves a unique set of facts that make it ill-suited for U. S. Supreme Court review and the wrong

case to serve as a pretext for assessing nominal differences in the U. S. Circuit Courts' application of the Anti-Injunction Act.

Here, the central issue raised in the District Court is whether the City has the authority to condemn the Bridge. Condemnation is a matter uniquely in the purview of the state court, and Kentucky statute requires a condemnation action to be filed in state court. *See* KRS § 416.570 (2004). The District Court action was merely an attempt by the Petitioner to avoid state court jurisdiction over the City's obvious authority to condemn the Bridge. The U. S. District Court thoroughly examined the "merits" of the Petitioner's claims and decided they were no bar to the City's authority to condemn.

Moreover, unlike other cases involving the timing of the state and federal actions in the context of applying the Anti-Injunction Act, this is not a case in which the City raced to the courthouse to file a state court action to gain a more favorable venue. The City had no choice but to file its condemnation action in state court, since Kentucky requires such an action to be filed there. KRS § 416.570 (2004). Likewise, neither did the City rush to file its action to avoid a pending ruling by the federal court. No ruling was pending. Indeed, neither the City's motion for summary judgment nor any motion by the Petitioner was ripe for decision when the state court condemnation action was filed.

Ultimately, this case does not merit attention by the U. S. Supreme Court because, even if the Court issues a writ, determines that the Anti-Injunction Act does not bar Martingale's action, and remands the case to the Sixth Circuit, the outcome is not likely to change. As fully set

forth in Section IV, the City obtained summary judgment on the merits of the claims at issue, and it is highly unlikely that the Sixth Circuit would find grounds for overturning the U. S. District Court's summary judgment should it be required to examine that judgment on remand.

II. Petitioner's Cases Applying the Anti-Injunction Act Are Readily Distinguishable.

The Petitioner makes much ado about the split among the circuits concerning application of the Anti-Injunction Act. The split among the circuits has no impact here, however, because the cases cited by the Petitioner are distinguishable on the unique set of facts before the Court. Even under the cited cases, the Anti-Injunction Act still prevents the trial court from enjoining the state court action in this instance.

A. Seventh Circuit – *Barancik*

The Petitioner relies most heavily on the Seventh Circuit's decision in *Barancik v. Investors Funding Corporation of New York*, 489 F.2d 933 (7th Cir. 1973) – purportedly the "clearest conflict" with the Sixth Circuit due to the Seventh Circuit's allegedly "ironclad" first-to-file rule. Petition at 7, 11. Due, however, to the unique facts in both *Barancik* and this case, this matter would not be decided differently in the Seventh Circuit than in the Sixth.

In *Barancik*, the plaintiffs owned certain real estate that they sold to the defendants in a sale-leaseback transaction. After a dispute arose relating to payments under the transaction, the plaintiffs filed suit in federal court, alleging several claims, including claims under the Securities

Exchange Act of 1934. *Id.* at 934. After the defendants served a formal notice of default, the plaintiffs moved for an injunction to prohibit the defendants from pursuing the defaults in state court. *Id.* at 934. Over the next five months, the parties filed various papers relating to pending motions. *Id.* On January 5, 1973, the federal court judge ordered the parties to make a report on January 16, 1973, on the status of the questions raised by the plaintiff's motion. *Id.*

On January 11, 1973, approximately eight months after the federal court action was initially filed and after months of briefing the issues, the defendants filed a forcible entry and detainer action in Illinois state court. Trial of that action was set for January 25, 1973. *Id.* The parties appeared in the federal court action on January 16, 1973, and informed the court of the development. *Id.* On January 25, 1973, the day before the state court trial was to commence, the U. S. District Court enjoined the defendants from proceeding with the state court action. *Id.*

The Seventh Circuit held the Anti-Injunction Act did not bar the federal court from hearing the injunction motion because the federal court action was filed before the state court action. That decision was based in part on the reasoning: "if a defendant has endeavored to delay proceedings or to forestall decision on issues pending in the federal court," the filing of a subsequent state action "may represent an attempt to obtain a more favorable forum. It may tend to fragment litigation which is best decided as a single matter; it may even evidence disrespect for the federal tribunal." *Id.* at 936.

Further, the court held the plaintiff's motion was "ripe for decision by the federal court when the defendant

invoked the jurisdiction" of the state court. *Id.* "During its process of deliberation, the court, not the defendant, should have the ultimate power to determine the scope of its authority." *Id.* at 937. In summary, the court ruled, "the commencement of the state action after the filing of the status quo motion, at a time when it was apparent to all concerned that the motion was about to be decided, was merely one factor for the court to consider in exercising its discretion." *Id.* at 938.

The unique circumstances of *Barancik* are entirely distinguishable from those in this case. Here, the City filed the state court action only three months after federal court action was filed and before any briefing or other activity had taken place in the federal court action. Unlike *Barancik*, the injunction was not ripe for deliberation when the City filed its condemnation action in state court. There was no motion pending on which the trial court could have ruled. Moreover, the City did not file its condemnation action in federal court merely to seek a better venue for the issues to be determined by the federal court. The City had no choice but to file its condemnation action in state court due to the unique nature of a condemnation proceeding. Only a state court can hear a condemnation action. *See* KRS § 416.570 (2004). The City was not, therefore, opting for a more favorable forum in the state court. The reasoning of *Barancik* simply does not support the outcome the Petitioner seeks.

Moreover, *Barancik* was decided thirty-one years ago, and since that time the Seventh Circuit has had only one occasion to cite it, in a dissenting opinion by Judge Cudahy in *Palmer v. Chicago*, 755 F.2d 560 (7th Cir. 1985), for the general proposition that a federal court should enjoin a state action that threatened to disburse funds

while federal proceedings were ongoing. *Id.* at 579, n. 2. The Seventh Circuit has not addressed the issue of the applicability of the Anti-Injunction Act in a first-filed federal case since *Barancik* was decided more than thirty years ago. A more recent decision by the Seventh Circuit suggests recognition that the Anti-Injunction Act is to be applied broadly to bar federal injunctions of state proceedings. *Blunt, Ellis & Loewi, Inc. v. Hlavinka*, 896 F.2d 240, 241 (7th Cir. 1990), *cert. denied*, 498 U.S. 813 (1990) (citing *Chick Kam Choo v. Exxon*, 486 U.S. 140, 147 (1988) ("The Supreme Court has recognized that the exceptions to the Anti-Injunction Act are narrow and not to be enlarged by loose statutory construction")).

The Seventh Circuit has, accordingly, permitted an injunction against a state court action only when a party's motives in pursuing the state court action, rather than waiting for a decision on an already-briefed federal court action, are questionable. That is not the situation here, and there is no reason to believe the Seventh Circuit would have permitted or condoned an injunction against a state court condemnation proceeding under the present circumstances. The nominal differences between the Sixth and Seventh Circuits would not affect the outcome here, and this case is not an appropriate vehicle to reach those differences.

B. First Circuit – *Hyde Park Partners*

The case of *Hyde Park Partners, LP v. Connolly*, 839 F.2d 839 (1st Cir. 1988), from the circuit the Petitioner identifies as applying the "pure First-to-File" rule, Petition at 9, is also distinguishable from this case on its facts. There, the plaintiff attempted to take over the defendant

company in a manner which violated the Massachusetts takeover statute. *Id.* at 840. On December 21, 1987, at 11:05 a.m., the purchaser sought an injunction in federal district court to enjoin the Commonwealth of Massachusetts and the takeover target from enforcing the statute, and the court set a hearing for 11:00 a.m. the following day. *Id.* At approximately 4:45 p.m. on the 21st, the target filed a complaint in state court seeking to enjoin the purchaser from purchasing the shares to effectuate the target. *Id.*

After the state court declined to grant the target's request for a temporary restraining order the afternoon of the 21st, due to insufficient facts in the complaint, the target filed an amended complaint the following morning, two hours before the federal court hearing was to begin. *Id.* at 841. Within minutes, the purchaser filed removal papers to remove the state court action to federal court. *Id.* Despite the removal petition, the state court granted the target's motion for a temporary restraining order and scheduled a hearing on a preliminary injunction for December 29, 1987. *Id.* The same day, the federal court denied the target's motion for remand of the state court case and granted the purchaser's preliminary injunction in the federal case, which was the subject of the appeal. *Id.*

The First Circuit determined that "the proper balance between federal and state courts . . . all but evaporate under inspection of the peculiar removal procedures that transpired in this chaotic flurry of litigation." *Id.* The court found that the removal of the state court proceeding was effectuated as soon as the removal papers were filed, and at that point the jurisdiction of the state court ceased. "The subsequent hearing and temporary restraining order

by the Superior Court were void *ab initio*." *Id.* at 842. Therefore, the First Circuit found the federal court injunction did not deprive the target of the earlier restraining order because the latter "'was a nullity anyway.'" *Id.* (citing *Polyplastics, Inc. v. Transconex, Inc.*, 713 F.2d 875, 880 (1st Cir. 1983)).

Further, the First Circuit held removal "was proper even if it was done in order to escape the strictures of the Anti-Injunction Act." *Id.* (citing *Bondurant v. Watson*, 103 U.S. (13 Otto) 281, 287-288 (1880)). To that, the court added a footnote, stating:

> The Anti-Injunction Act, 28 U.S.C. § 2283, does not, in any event, bar injunctive relief that would run against a state court – as, in effect, would the relief ordered here [citation omitted] when the federal court's injunctive power is *invoked* (i.e., requested) by the plaintiff before the state court action is commenced. *See Barancik v. Investors Funding Corporation of New York*, 489 F.2d 933 (7th Cir. 1973); *Nat'l City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1127 (8th Cir. 1982). *But see Roth v. Bank of the Commonwealth*, 583 F.2d 527 (1978).

Id., n. 6 (emphasis in original). Thus, the First Circuit does not apply the principle to the substantive facts of the case, but merely references it in a footnote as dicta. It does not evaluate the principle or assess either position. Moreover, the First Circuit acknowledges the contrary holding

in *Roth* – not a resounding endorsement of the "First-to-File" rule.[2]

Furthermore, the facts of the case are distinguishable from those in *Hyde Park*. Most importantly, here – unlike *Hyde Park* – the state court had jurisdiction over its proceeding as no removal notice was, or could have been, filed. Also, in *Hyde Park*, the court emphasized the "flurry of litigation" which precipitated both the state court temporary restraining order and the federal court injunction to be issued on the same day. Similar to *Barancik*, there was a clear race to the courthouse between the parties. In this case, however, the City was not racing to the state courthouse before the federal court could decide the issues. Indeed, there was no motion pending which the federal court could decide. Moreover, the City had no choice but to file its action in state court, since only a state court has jurisdiction over a condemnation action. The factual circumstances presented by the petition are readily distinguishable from *Hyde Park*, and *Hyde Park* does not prevent applying the Act in these circumstances.

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[2] The Petitioner also cites *Phillip Morris Inc. v. Harshbarger*, 946 F.Supp. 1067 (D. Mass. 1996). In that case, the U. S. District, noting that the action was brought, in part, under 42 U.S.C. § 1983, which authorized injunctive relief against state court proceedings, merely followed the First Circuit's dicta in *Hyde Park* to find a first-filed federal action is not barred by the Anti-Injunction Act. The Court acknowledged that three of the Circuit Courts of Appeal hold the Act does apply and then went on to abstain from any further proceedings in the federal case until the state court case was concluded. *Id.* at 1074 (citing *Royal Insurance Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993); *Standard Microsystems Corp. v. Texas Instruments*, 916 F.2d 58, 61-92 (2d Cir. 1990); and *Roth v. Bank of Commonwealth*, 583 F.2d 527, 533 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 (1979)).

C. Eighth Circuit – *Prudential Insurance*

In addition to the so-called "first-to-file" issue, Martingale tries to distinguish between the outcome of its claim for injunctive relief and its claim for declaratory relief – the argument the Sixth Circuit found "clever but unpersuasive." App. at 10. It claims that the Eighth and Fifth Circuits employ a "comity" rule in which district courts have discretion to hear a declaratory judgment action that predates a state court action. Petition at 11. Yet even under this "comity" rule, there is no reason to believe the Eighth or Fifth Circuits would permit Martingale's declaratory judgment action to proceed.

In fact, the cases applying the so-called "comity" rule support a ruling in favor of the City in this case. For example, in *Prudential Insurance Company of America v. Doe*, 140 F.3d 785 (8th Cir. 1998), the Eighth Circuit found that the Anti-Injunction Act will not bar a federal court from proceeding with a declaratory judgment action "where the federal suit is filed substantially prior to any state suits, significant proceedings have taken place in the federal suit, and the federal suit has neither the purpose nor the effect of overturning a previous state court ruling." *Id.* at 788 (citing *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 886 (5th Cir. 1993)).

In *Prudential*, the federal court action was initially filed in June 1994, and the state court action was not filed until March 1995. Thus, approximately nine months elapsed before the federal court defendant filed the state court action. (It is unclear from the reported facts whether any "significant proceedings" had taken place in the first-filed federal court action.) The Eighth Circuit concluded

that it was not prohibited by the Anti-Injunction Act from hearing the federal suit.

Unlike *Prudential*, the state court action in this case was filed only three months after the federal court case and before any proceedings, other than the filing of the complaint and the answer, had taken place in the federal lawsuit. Therefore, under the "comity" analysis of the Eighth Circuit, the federal court is prohibited by the Anti-Injunction Act from hearing this case.[3]

D. Third Circuit – *Thiokol*

The Petitioner identifies the Third Circuit's position as "First-to-File, if Federal Question." Petition at 9. The Anti-Injunction Act clearly precludes Petitioner's federal court action under this approach, as well. In *Thiokol Chemical Corp. v. Burlington Indus. Inc.*, 448 F.2d 1328, 1330 (3d Cir. 1971), the plaintiff used a product for which a manufacturer claimed it held patents. The plaintiff first sued the manufacturer in federal court, seeking a declaratory judgment concerning the patents and amounts owed, but the suit was dismissed based on lack of federal jurisdiction. *Id.* The manufacturer then sued the plaintiff in state court, seeking royalties on account of past use of the questioned patents. *Id.* at 1331. The plaintiff then filed a second suit in federal court seeking a declaratory judgment that the patents were invalid. *Id.* The manufacturer

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[3] The Fifth Circuit also applies the "comity" analysis, most recently in *Royal Insurance Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 884 (5th Cir. 1993) (cited in *Prudential*, 140 F.3d at 788). That case is distinguishable for the same reasons.

moved to dismiss the second federal court action, and the court denied that motion. *Id.*

On a consolidated appeal from the decisions in the first and second federal court actions, the Third Circuit – like the Sixth Circuit – held that the Anti-Injunction Act precluded a federal injunction restraining the state court proceeding. The Third Circuit found the principal legal issues in the state court action were the validity and the infringement of the patents. *Id.* "Preferring a federal adjudication of these questions, the plaintiff seeks through the present action to forestall an otherwise competent and authoritative state ruling." *Id.* The court held the Anti-Injunction Act precluded the issuance of a federal injunction restraining the state court action. *Id.* Thus, *Thiokol* did not even concern a first-filed federal action since the initial federal action was dismissed and the state court action was filed before the second federal action.

Where *Thiokol* does differ slightly from the Sixth Circuit opinion at issue is with regard to the declaratory judgment portion of the action. On the question of whether the plaintiff could continue to pursue its declaratory judgment action, the Third Circuit noted that "[n]ormally, the policy that precludes federal injunctions against state actions is also applied to prohibit declaratory judgments which, though not enjoining the state proceeding, would decide and preempt the matter pending there." *Id.* While recognizing that the Anti-Injunction Act's "analogical extension to prohibit declaratory judgments is justified in situations where the underlying policy against unseemly interference with proper state litigation applies to both," the Third Circuit went on to hold:

> [I]f the state suit is likely to turn on a question of federal law with which a federal court is likely to be more familiar and experienced than the state court, and if the state court does not proceed in normal course to adjudicate the matter or otherwise manifests willingness to hold its hand pending federal decision on that question, we think it is neither necessary nor desirable to construe section 2283 as precluding the federal court from issuing a declaratory judgment on the common federal question.

Id. at 1332. Under this reasoning, the court held the declaratory judgment portion of the federal district court case could proceed, since the validity and infringement of the federal patents were at issue. *Id.*

Applying the Third Circuit's reasoning to the facts at hand, the Anti-Injunction Act precludes the federal action here. First, the "underlying policy against unseemly interference with proper state litigation" clearly applies to state court condemnation proceedings. In addition, the issues before the federal court do not "turn on a question of federal law with which a federal court is likely to be more familiar." *Id.* At issue in *Thiokol* was the validity of patent rights, clearly a federal issue. At the heart of this action is whether the City has the right to condemn the Bridge. Condemnation is a matter peculiarly in the purview of a state court, so the state court is more likely to be familiar and experienced with the issue than the federal court. Further, unlike the plaintiff in *Thiokol*, the City is not merely seeking to forestall adjudication in federal court. It had no choice but to file the condemnation action in state court.

Moreover, the Third Circuit also held that the second federal suit "should not proceed unless and until it shall appear to and be found by the district court that the state court is willing to hold the matter before it in abeyance pending a declaratory federal adjudication." *Id.* When the City filed its state court condemnation action, the state court manifested no such willingness to defer to the federal court on the issues. Indeed, the court heard the condemnation proceeding and, in due course, ordered the condemnation of the Bridge. Simply put, under the Third Circuit's reasoning, the federal court action is still barred by the Anti-Injunction Act.

III. The So-Called First-to-File Rule Is a Distinction Without a Difference.

Even if the Court should determine that a conflict exists among the Circuit Courts that cannot be distinguished on this case's facts and decides to take up this issue, the Court should adopt the rule applied by the Second, Fourth, and Sixth Circuits. The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Act serves as a "'necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts' and 'represents Congress' considered judgment as to how to balance the tensions inherent in such a system.'" *Denny's,*

Inc. v. Cake, 364 F.3d 521, 528 (4th Cir. 2004) (citing *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988)).

The Supreme Court has "repeatedly ruled that the ban is absolute and the language is to be taken literally." *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 533 (6th Cir. 1978) (citing *Atlantic Coast Line R.R. Co. v. Locomotive Engineers*, 398 U.S. 281, 286-87 (1970)); *see also Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977) (plurality opinion). Any doubts as to the propriety of the federal court staying a state court action should be resolved in favor of allowing the state court action to proceed. *Vendo*, 433 U.S. at 630.

In addition to three exceptions adopted by Congress, an additional "judicial exception" was created by the Seventh Circuit in *Barancik, supra*, 489 F.2d 933. *Denny's*, 364 F.3d at 529. In interpreting a statute, a court must first turn to the plain language of the statute to determine its meaning. *See Williams v. Taylor*, 529 U.S. 420, 431 (2000). "The plain language of the Act clearly and unequivocally prohibits a federal court from granting 'an injunction to stay proceedings in a State court.'" *Denny's*, 364 F.3d at 529 (citing 28 U.S.C. § 2283).

The Sixth Circuit in *Roth* acknowledged the concern expressed by now-Justice Stevens in *Barancik* that the Seventh Circuit's approach had "the salutary advantage of discouraging the unseemly race to the courthouse." *Roth*, 583 F.2d at 532 (citing *Barancik*, 489 F.2d at 935). This concern is not abated by avoiding the application of the Act. "As long as the commencement of state proceedings in any way affects or triggers the operation of the anti-injunction

statute, a race is assured, unseemly or not. . . . *Barancik* does not eliminate the race; it merely moves the finish line." *Id.* at 532-33.

Likewise, the Second Circuit also rejected *Barancik*'s concern that a court's power to rule could be defeated by the quicker action of a litigant. That court found it "axiomatic" that a state court action should not be enjoined "merely because an adverse litigant has **applied** for an order to bar such action." *Standard Microsystems Corp. v. Texas Instruments, Inc.*, 916 F.2d 58, 62 (2d Cir. 1990) (emphasis in original). Further, it held:

> A party that has not been enjoined is ordinarily free to act, notwithstanding the pendency of applications to enjoin the action. In many circumstances litigants may lawfully moot an application by acting before the court has ruled. To enjoin conduct requires a judge's order, not merely an application for a judge's order. Where speed is needed, the rules of procedure provide for temporary restraining orders, even without notice, to prevent irreparable harm.

Id.

Furthermore, the Second Circuit warned that, under *Barancik*, "merely by filing an application for relief, a party nullifies an Act of Congress." *Id.* The Anti-Injunction Act seeks to avoid the "friction" between federal and state courts. The *Barancik* approach puts "the power in the hands of the plaintiff unilaterally to nullify the effectiveness of an Act of Congress and to create exactly the kind of federal-state conflict that Congress sought to prevent." *Id.* (citing *Hicks v. Miranda*, 422 U.S. 332, 348-50 (1975)).

Clearly, on this reasoning, the rule applied by the Second, Fourth, and Sixth Circuits is the better approach.

IV. Reviewing The Circuit Court's Application of the Anti-Injunction Act Will Not Change the Outcome Because of the District Court's Decision on the Merits.

As outlined in Section I, even if this Court issues a writ, determines that the Anti-Injunction Act does not bar Martingale's action, and remands the case to the Sixth Circuit, the outcome is not likely to change because the District Court made the correct decision on the merits.

A. The Petitioner Does Not Have a Franchise, and the City Is Not Condemning a Franchise.

The Petitioner claimed it has a "subsisting and perpetual federal and state granted right to operate the Bridge" based on franchises allegedly granted by the federal government and the Commonwealth of Kentucky. The Petitioner's assertions failed because it does not own a franchise, and the City need not condemn a franchise to condemn the Bridge itself.

A franchise is "a right or privilege granted by a sovereign power to a party to do some act which such party could not do without a grant from the government." *Eastern Kentucky Resources v. Arnett*, 934 S.W.2d 270, 275 (Ky. 1996). A franchise is an intangible property right, a right to do something that the general public cannot. *See Covington Drawbridge Co. v. Shepherd*, 62 U.S. 112, 123 (1858). A franchise is not a physical structure. In this case,

the franchise was the right to collect tolls, a separate legal interest from the bridge itself. *Id.* at 124.

There is evidence of one franchise being granted to the original owner of the Bridge. In 1888, the Kentucky General Assembly passed a law incorporating the Louisville and Jeffersonville Bridge Company. 1888 Ky. Acts, ch. 212, § 1. The General Assembly also granted the company the "right and power to construct, maintain and operate a bridge" between Louisville and Jeffersonville, Indiana, and the right "to charge, demand and receive tolls for the use thereof." *Id.* at § 2. The General Assembly expressly granted the Louisville and Jeffersonville Bridge Company the authority to "enjoy all corporate powers, privileges and franchises necessary or proper to enable [it] to carry out and execute the purposes hereinafter designated." *Id.* at § 1.

Contrary to the Petitioner's claims before the District Court, regardless of previous owners' franchise rights, Martingale did not acquire a franchise. When Bridge the Gap purchased the Bridge at the sheriff's sale for $10,300, it did not purchase the right to collect tolls on the Bridge. It purchased nothing more than the "superstructure, beams, bolts, support pilings, piers, abutments and other improvements that are part of the Bridge itself," that the City seeks to acquire by eminent domain.

The Petitioner cannot claim now it has a franchise – the franchise, if any, was abandoned long ago. The ICC's formal abandonment order on May 1, 1969, the razing of the Bridge's approaches thirty years ago, and the fact that the Bridge has not been used for transportation of any vehicles, persons, or livestock in thirty years extinguished

this right. The franchise ceased long ago to serve the public and has been abandoned.

The trial court correctly found that the franchise was abandoned in 1969 when the ICC formally abandoned the bridge. Further, it found that the franchise, having not been exercised in thirty years, had ceased to serve the public. Relying on *Jack v. Williams*, 113 F. 823 (D.S.C. 1902), the trial court correctly concluded that a franchise that has ceased to serve the public is deemed to be abandoned.

The U. S. Supreme Court agrees that non-use of a franchise causes the franchise to be forfeited. In *Railroad Commission of Texas v. Eastern Texas Railroad Company*, 264 U.S. 79 (1924), the Court found a railroad company had forfeited its franchise when the company had "ceased to exercise the privilege conferred by its charter, of maintaining and operating the road as a common carrier, – and this is because the available traffic has diminished to a point where further operation is economically not possible." *Id.* at 87. *See also Given v. Wright*, 117 U.S. 648, 656 (1886) (A "franchise may be lost in the same way, nonuser being one of the common grounds assigned as a cause of forfeiture").

B. The City Has the Right to Condemn the Bridge as Personal Property.

The Petitioner also alleged that the City does not have the authority to condemn the Bridge because the City is only permitted to condemn "real property and personal property located on such real property." This argument also is misleading.

KRS § 97.257 relates to the power of cities of the first class to acquire by condemnation property needed for any park, playground, or community center. The statute states in full:

> Whenever property shall be needed by any city of the first class for any park, playground, or community center purpose contemplated in KRS 97.250 to 97.257, either within or beyond the boundaries of such city, in the county in which such city is located, the director of parks and recreation may, with the consent of the legislative body of such city, order the condemnation of such property in the manner provided in the Eminent Domain Act of Kentucky.

Significantly, the statute does not limit the City's powers of eminent domain to "real" property. Rather, the statute simply permits the condemnation of "property." KRS § 416.540, the definitions provision of the Eminent Domain Act, defines "property" as "real or personal property, or both, of any nature or kind that is subject to condemnation." The absence of any limitation on the type of property that a city of the first class can condemn for a public park, therefore, is significant and controlling.

The Petitioner's reliance in the District Court on KRS § 97.251, the definition of "park property," is immaterial for condemnation purposes. The Petitioner contended that the City only has the power to condemn "park property" and that the definition of "park property" does not include "personal property," "franchises," or "bridges." KRS § 97.257 grants the City the right to condemn "property," however, not "park property." The definition of "property" includes "real or personal property, or both, of any nature or kind that is subject to condemnation." KRS § 416.540. Even if

KRS § 97.251 had any application, the definition of "park property" clearly includes personal property since items of personal property, such as "seats," "benches," and "fountains," are specifically included in the statute.

KRS § 97.257 also directs that condemnation is to proceed under the Eminent Domain Act of Kentucky. The Eminent Domain Act of Kentucky provides:

> Whenever any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed for any of the uses or purposes for which the condemnor is authorized by law, to exercise its right of eminent domain, the condemnor may condemn such property, property rights, privileges or easements pursuant to the provisions of KRS 416.550 to 416.670. It is not a prerequisite to an action to attempt to agree with an owner who is unknown or who, after reasonable effort, cannot be found within the state or with an owner who is under a disability.

KRS § 416.550 (2004).

The City has the unquestionable authority to condemn the Bridge as personal property under the Eminent Domain Act. The Act's general grant of power includes the right to "acquire the property right, privileges or easements. . . ." Such a broad grant of authority sanctions the City's acquisition of the Bridge.

C. The Bridge Is Not Operated in Interstate Commerce, and No Federal Law Prohibits the City from Condemning It.

Finally, the Petitioner argued that the City is prohibited from condemning the Bridge because the Bridge

operates in interstate commerce. As the trial court recognized, however, "the contention that the Bridge is in interstate commerce is ludicrous. The structure is usable only by pigeons and other winged creatures." App. at 19.

1. The Rivers and Harbors Act does not affect the City's right to condemn the Bridge or the City's authority over the Bridge.

The Petitioner alleged that "[t]he City and Waterfront do not have authority to condemn the Bridge because under federal law, specifically 33 U.S.C. § 401, et seq., neither a state nor a local government has authority as to a bridge over navigable waters which forms part of interstate commerce."

The Petitioner's first error was its contention that the Bridge "forms a part of interstate commerce." A bridge that has no approaches and no points of access can hardly be claimed to be "a part of interstate commerce." The owners who last operated the Bridge as a railroad line petitioned in 1968 to abandon the Bridge. When the Interstate Commerce Commission formally approved the abandonment on May 1, 1969, it concluded that "the continued maintenance and operation of the [Bridge] would impose an undue and unnecessary burden on applicant and upon interstate commerce."

Moreover, the Petitioner contended that "[t]he Big Four Bridge . . . having been constructed under the authority of the U. S. Congress under a specific Act [River and Harbors Appropriation Act] nonetheless remains a part of interstate commerce by virtue of the provisions of 33 U.S.C. § 401 et seq." The Rivers and Harbors Act, however, regulates construction of bridges over the river by those who otherwise

have authority to construct – it does not grant a franchise or authority to construct. Perhaps due to the fact that the Act does not prohibit condemnation of the Bridge, the Petitioner failed to identify the specific portion of the Rivers and Harbors Act (which comprises "33 U.S.C. § 401 et seq.") that it contended entitled it to the relief sought. As the trial court pointed out, "[n]o specific section of the Act is cited, and possibly for good reason. Our own review indicates that the Act does not prohibit condemnation." App. 20.

2. The condemnation of the Bridge will not impermissibly burden interstate commerce.

The Petitioner also contended that if federal law does not automatically render all bridges to be "in interstate commerce," then Bridge the Gap's specific use of the Bridge renders it "in interstate commerce." Since Bridge the Gap purchased the Bridge in 1987, the alleged commercial activity related to the Bridge itself consists of the lighting of the Bridge during holiday seasons. Holiday lighting is certainly not one of the uses envisioned when the bridge franchise was created, and Petitioner stretched credulity by contending in the District Court that an ability to see lights from two states creates interstate commerce.

3. The ICC's Order of Abandonment terminated federal jurisdiction over the operation of the Bridge and cleared the way for the Bridge's condemnation under state law.

The Petitioner conceded that the Bridge has been abandoned as a rail line. It maintained, however, that the

abandonment of the rail line is not an abandonment of the Bridge itself.

This theoretical scenario is unavailing. Practically speaking, neither Bridge the Gap nor Martingale nor any purchaser of the Bridge has the ability to use the Bridge for a railroad because there are no means of access to the Bridge superstructure. The Kentucky and Indiana approaches to the Bridge were demolished over 25 years ago, and the approaches cannot be replaced because ownership of the real estate under the Bridge was severed by a previous owner. Bridge the Gap and Martingale do not even have an easement to access the Bridge from the land on either side of the Ohio River. Any implied easement would only relate to access without ramps, the status when the real estate was severed. Therefore, the suggestion that a rail line could ever be constructed again on the Bridge is simply impossible.

4. The Bridge is not a post route, and condemnation will not unconstitutionally interfere with the delivery of mail.

The Petitioner also argued that the City does not have authority to condemn the Bridge because past designation of the Bridge as a post route places it in interstate commerce. The trial court properly rejected this argument, holding that "[d]esignation of the Bridge as a post route in the late 1800s does not preclude its abandonment and condemnation in 2002 after many years of disuse. We find nothing in the Constitution which requires the perpetuation of an inaccessible, abandoned bridge structure in order to preserve a long-unused post route designation." App. at 21.

CONCLUSION

Although the Petitioner makes every effort to exploit a supposed split among the Circuit Courts of Appeal on the application of the Anti-Injunction Act, the differences among the circuits have no impact here because the reasoning behind the decisions declining to apply the Act are distinguishable based on the unique facts of this case. This case is simply the wrong case for the Supreme Court to consider for rulemaking on the Anti-Injunction Act. There is no reason to believe that if this case had been decided in any circuit other than the Sixth that a different result would have been reached. And, even if the Court were to decline to apply the Anti-Injunction Act, the City would still prevail on the merits of this case.

For the foregoing reasons, the Respondents request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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(3)

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MARTINGALE, LLC

Petitioner,

v.

THE CITY OF LOUISVILLE; WATERFRONT DEVELOPMENT CORPORATION

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MARTINGALE'S REPLY MEMORANDUM IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

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1. Respondents admit that a Circuit conflict exists.

Respondents admit that there is a split among the Circuits over the application of 28 U.S.C. Section 2283 to a first-filed federal question action, stating: "The split among the circuits has no impact here . . . ". Response at 7. In fact, Respondents at one point argue that the Supreme Court should resolve the admitted split, asserting, "the [Supreme] Court should adopt the rule applied by the Second, Fourth, and the Sixth Circuits." Response at 18. Thus, Respondents actually suggest that certiorari should be granted to resolve the admitted split in the Circuits because this is the *only* way the Supreme Court could adopt the rule proposed by Respondents.

2. Factual distinctions between the various Circuit decisions are irrelevant.

That Section 2283 may apply to literally hundreds of factual scenarios is no reason to deny certiorari and is implicit in the Act itself. Martingale's position is that the rule first announced by the Sixth Circuit in *Roth v. Bank of Commonwealth*, 583 F.2d 527 (6th Cir. 1978), *cert. granted*, 440 U.S. 944 (1979), *cert. dismissed*, 442 U.S. 925 (1979) and continued here diverges significantly from the rules of the other Circuits. Martingale is not asserting that this case is *factually* similar to the dozen or so cases from different circuits which have applied different rules when interpreting the Act. The question is which rule of law should be applied in this case given that the Circuits have adopted so many different rules.

To advance their factual distinction arguments, Respondents mischaracterize the case most starkly at odds with the Sixth Circuit's *Roth* case, *Barancik v. Investors*

Funding Corp. of New York, 489 F.2d 933 (7th Cir. 1973) on several levels. In doing so, respondents focus almost exclusively on the factual underpinnings of the case and largely ignore the rule of law the *Barancik* Court announced which was itself not fact specific at all.

Respondents claim that the *Barancik* rule depended on the party's motivation in filing the state court action. However, the rule the Seventh Circuit adopted did not depend upon the motivation of the parties, "the mandatory prohibition in Section 2283 against injunctions staying court proceedings does not apply to state actions commenced after a motion for injunctive relief is filed in the federal court." *Id.* at 938.

Likewise, Respondents claim that in *Barancik* a federal motion was pending and that in this case "there was no motion pending on which the trial court could have ruled." Response at 8-9. Respondents base this statement on the fact that the filed motion for summary judgment was not ripe for decision. Again, this factual distinction found no part in the rule announced by the Seventh Circuit.

Finally, Respondents seem to assert that the Sixth Circuit in deciding this case merely distinguished its holding from that in *Barancik* on a factual basis. Again, any factual distinctions between the cases did not cause the differences between the Sixth and Seventh Circuit rules. Rather, the Sixth Circuit explicitly stated that it disagreed with the *logic* of the Seventh Circuit's holding. *Martingale, LLC v. City of Louisville*, 361 F.3d 297, 304 (6th Cir. 2004).

3. Because a split exists between the Circuits, the correctness of the underlying District Court decision is irrelevant.

Respondents request that the Supreme Court deny certiorari because of the alleged correctness of the underlying District Court decision. Response at 21. The Petitioner, however, has been denied its statutory right to an appeal *on the merits* of the District Court decision as required by 28 U.S.C. § 1291. The Court of Appeals refused to review the merits of the District Court decision because it found that the District Court did not have the *power* to decide the case. *Martingale, LLC*, 361 F.3d at 304. The requested Writ of Certiorari has nothing to do with the correctness of the District Court decision. We are not asking the Supreme Court to review the merits of the District Court's decision and, indeed, it is unlikely that this would be done because that issue was not decided by the Court of Appeals and is, therefore, not likely to be before this Court. Rather, we are asking the Supreme Court to grant us our statutory right to a review of the District Court decision by the United States Court of Appeals for the Sixth Circuit.

4. The existence of state law issues does not foreclose federal court review or the granting of certiorari.

Respondents argue that because the condemnation action here must allegedly be filed in State court, it follows that no federal action to resolve related federal claims can be pursued because the sole issue in the state condemnation action is whether the City has the right to condemn the bridge. Response at 6. However, this Court, in the face of a Section 2283 challenge, has recognized that a pending

state court proceeding does not necessarily preclude a federal court from adjudicating the merits of a related federal action as long as no injunction is issued against the state court proceeding. See *Atlantic Coast Line R.R. Co. v. Locomotive Engineers*, 398 U.S. 281, 295 (1970). ("In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.")

The issues of paramount importance to Martingale, here, are not insubstantial federal questions. These issues include among others:

- May a city, as a subordinate sovereign, condemn a federal franchise? The Supreme Court in *State of California v. Central Pac. R. Co.*, 127 U.S. 141 (1888) held that a state cannot interfere with rights guaranteed by a superior sovereign – the United States – by taxing federal franchise rights.

- May a city condemn a bridge over a navigable stream? The Supreme Court held in *Covington & C. Bridge Co. v. Kentucky,* 154 U.S. 204 (1894) that a state could not regulate an interstate bridge established under federal law.

While these issues certainly impact upon the State Court's condemnation/right-to-take determination, they are essentially paramount federal issues. That is to say: (1) the rights which are inherent in federal franchises invoke the supremacy clause; and (2) the rights which exist with respect to bridges over navigable streams in interstate commerce invoke the interstate commerce clause.

5. Conclusion.

Certiorari should be granted because of the significant federal interest in resolving the split in the Circuits about whether a District Court may proceed to decide a first-filed federal question action when a related state law case has been filed but remains undecided.

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